



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 500 OF 2019

**BABA DOGO SECONDARY SCHOOL.....APPELLANT**

**VERSUS**

**E.K. MAINA T/A CHEM EQUIPMENT ENTERPRISES LIMITED....RESPONDENT**

**(Being an Appeal from the Ruling and order delivered on 16<sup>th</sup> November, 2018 by Hon. A.N. Makau, Principal Magistrate in the Chief Magistrate's court Civil Case No. 1797 of 2014)**

**JUDGMENT**

By his plaint dated 2<sup>nd</sup> April, 2014, the respondent claimed Kshs. 957,860 against the appellant. The claim was based on a tender for the supply of goods by the respondent to the appellant between 2010 and 2012. The appellant was represented by the firm of Onyatta & Company Advocates in the suit before the trial court. The respondent testified and closed his case while the appellant closed its case without calling any witness. Judgment was delivered in favour of the respondent as claimed in the plaint.

The appellant filed an application dated 11<sup>th</sup> September, 2018 seeking orders staying execution and setting aside the judgment. In its ruling delivered on 16<sup>th</sup> November, 2018, the trial court dismissed the application. The appeal is against that ruling and is brought on the following grounds:-

- 1. THAT the learned Magistrate erred in law and in fact in finding that there was no annexure "AWK1" annexed to the application dated 11<sup>th</sup> September 2018 whereas the same was availed.**
- 2. THAT the learned Magistrate erred in law and in fact in finding that the Appellant failed to demonstrate any merit in its case to warrant the prayers sought.**
- 3. THAT the learned Magistrate erred in law and in fact in finding that the record was clear that the Appellants were ably represented by a counsel of their own choice whereas it is the Appellant's contention that they were never informed of the hearing date.**
- 4. THAT the learned Magistrate erred in law and in fact in finding that the Defence had no sufficient explanation why it did not avail witnesses in the case.**
- 5. THAT the learned Magistrate erred in law and in fact in awarding costs of the application to the Respondent.**
- 6. THAT the learned Magistrate erred in law and in fact in failing to find that the Respondent had failed to prove his case on a balance of probabilities.**
- 7. THAT consequently, the learned Magistrate's decision occasioned a miscarriage of justice.**

Mr. Martin Munene from the Attorney General's office prosecuted the appeal. Counsel submit that the case was heard ex-parte and judgment delivered on 25<sup>th</sup> July, 2019 without the input of the appellant. Counsel for the appellant was not served with the hearing notice of 11<sup>th</sup> June, 2019. It is further submitted that although the firm of Onyatta & Co Advocates entered appearance and filed defence on behalf of the appellant, on 8<sup>th</sup> June, 2016 the Ministry of Education requested the Attorney General to represent the appellant. Thereafter, the matter came up for hearing on two occasions and a state counsel by the name of Christopher Siro appeared for the appellant. The matter was heard ex-parte on 11<sup>th</sup> June, 2018. It is contended that the letter notifying the appellant about the hearing date stated that the hearing was to be on

11<sup>th</sup> July, 2018 and not 11<sup>th</sup> June, 2018.

Counsel for the appellant contend that there was sufficient cause to set aside the judgment and also grant stay of execution since the appellant was going to suffer substantial loss. It is argued that the counsel who represented the appellant gave the wrong hearing date of 11<sup>th</sup> July, 2016 and not 11<sup>th</sup> June 2016 when the suit was heard. The appellant was not able to avail its witnesses due to the misinformation about the hearing date. Mr. Munene argue that although there was no notice of change of advocates filed, a state counsel appeared for the appellant and the blunders of counsel should not be visited upon an innocent client.

The appellant further maintain that it was condemned unheard and the hearing was not fair. The defence case was closed without calling any evidence and this caused a miscarriage of justice. The school principal filed a supporting affidavit stating that she was not served with a hearing notice and was therefore not aware of the hearing date. According to counsel, the plaintiff failed to prove his case on a balance of probabilities.

Mr. Njiraini appeared for the respondent. It is submitted that the appeal is incompetent as the order or ruling which is the subject of the appeal is not part of the record. The appellant was represented by the firm of Onyatta & Co. Advocates. There was no notice of change of advocates filed in court. The Attorney General's office was fully aware of the matter. A counsel appeared in court and represented the appellant. The defence opted not to call any witness. No witness statement was filed. The letter dated 8<sup>th</sup> June, 2016 from the Ministry of Education requesting the Attorney General to represent the appellant was not filed in court.

#### Analysis and Determination

The appeal is against the ruling of the trial court which declined to set aside its judgment. The issues for determination are:-

- i. Whether the appellant was properly represented by counsel before the trial court.
- ii. Whether the trial court's ruling has caused miscarriage of justice.

The plaint was filed on 3<sup>rd</sup> April, 2014. Summons were issued on 8<sup>th</sup> May, 2014. The appellant was served on 20<sup>th</sup> May 2014, vide affidavit of service by Samson Kinuthia sworn on 28<sup>th</sup> January, 2015 and filed in court on 26<sup>th</sup> February, 2015. A request for judgment was made on 26<sup>th</sup> February, 2015. Ex-parte judgment was entered on 6<sup>th</sup> March, 2015.

The record of the trial court shows that the appellant filed an application dated 15<sup>th</sup> October 2015 seeking to set aside the ex-parte judgment. The application was certified as urgent on 16<sup>th</sup> October, 2015 and listed for hearing on 27<sup>th</sup> October 2015. Interim orders staying execution were issued on the 27<sup>th</sup> October 2015. Mr. Njiraini appeared for the respondent while Miss Nyabundi appeared for the appellant. Subsequently, parties recorded a consent on 3<sup>rd</sup> December 2015. The terms of the consent as per the letter dated 16<sup>th</sup> November 2015 reads as follows:-

- “1. THAT the exparte judgment entered against the Defendant on 6.3.2015 and all consequential orders thereof be set aside.**
- 2. THAT throw away costs of Kenya Shillings Six Thousand (Kshs.6,000.00) be paid to the Plaintiff's advocates by the Defendant.**
- 3. THAT the Defendant be granted 14 days in which to file their defence from the date of filing this consent.”**

The consent letter was adopted as an order of the court on the same date of 3<sup>rd</sup> December, 2015.

The appellant filed its defence on 17<sup>th</sup> December, 2015 through the firm of Onyatta & Co. Advocates. It is the same firm of advocates which applied for setting aside the default judgment. According to the appellant's advocate, the only issue that was to be determined by the trial court was whether “the amount claimed by the plaintiff against the defendant in this suit is legitimate” This is as per the defendant's list of agreed issues filed in court on 10<sup>th</sup> July, 2017.

On 18<sup>th</sup> May 2017 counsel for the respondent fixed the case for hearing on 11<sup>th</sup> July 2017 ex-parte. On 11<sup>th</sup> July 2017 Mr. Siro appeared for the defendant. He told the court as follows:-

**“I was given instructions yesterday. I request for more time to put my house in order. I have just been served with a list of agreed issues. I need 14 days.”**

Once again the case was listed for mention on 11<sup>th</sup> December 2017 before Hon. I. Orege (SRM) Mr. Njenga appeared for the defendant while Miss Nyabundi appeared for the plaintiff. Parties confirmed compliance with pre-trial procedures. On 4<sup>th</sup> November 2018 counsel for the plaintiff took a hearing date ex-parte for 11<sup>th</sup> Jun, 2018. On that hearing date, Mr. Njiraini appeared for the plaintiff while Mr. Ibrahim Ongata appeared for the defendant. Counsel for the defendant stated as follows:-

**“I am ready to proceed. I will not call any witness.”**

The case proceeded for hearing and judgment was delivered on 25<sup>th</sup> July, 2018. On the same date counsel for the appellant wrote to the appellant informing them about the entry of judgment. The record shows that a hearing had been scheduled for 11<sup>th</sup> July, 2017 but on that date Mr. Odinga who appeared for the plaintiff informed the court that the case was meant for pre-trial conference. Mr. Siro appeared for the appellant on that date and requested to put his house on order. The appellant's application dated 11<sup>th</sup> September, 2018 was supported by the affidavit of Anne W. Kiragu, the school principal. Paragraphs 6, 8 and 10 of the affidavit states as follows:-

- 1. THAT the Defendant/Applicant thereafter instructed the firm of Onyata & Co. Advocates to represent the school in the matter.**
- 2. THAT the matter has come up for hearing on two occasions in which the matter did not proceed and a state counsel by the name Christopher Siro from the office of Attorney General has appeared on behalf of the Defendant school.**
- 3. THAT the counsel for the Plaintiff was thus aware that the matter is being handled by the Attorney General and as such he should have served the hearing notice upon the Attorney General or the Defendant school.**
- 4. THAT the matter came up for ex-parte hearing on 11 June 2018 wherein the Plaintiff testified without the Knowledge of the Defendant/Applicant.**

Paragraph (h) of Mr. Munene's submissions states as follows:-

**“The firm of Onyata & Co. Advocates enclosed a letter dated 29<sup>th</sup> June 2017, in which they purported to have notified the Appellant of the hearing scheduled for 11<sup>th</sup> June 2018 whereas the true position is that the said letter was informing the Appellant of hearing date for 11<sup>th</sup> July 2017 (Annexure “AWK 2”)**

It is evident that counsel for the appellant seems to suggest that the letter from Mr. Ebrahim Onyatta dated 29<sup>th</sup> July 2017 was notifying the appellant about the hearing of the case on 11<sup>th</sup> June, 2018. That letter was referring to the hearing on 11<sup>th</sup> July, 2017 when Mr. Siro appeared and the matter did not take off as it was meant for pre-trial conferencing. The case was heard one year later on 11<sup>th</sup> July, 2018 when the appellant's counsel appeared and cross-examined the respondent. The letter from M/s Onyatta & Co. Advocates of 29<sup>th</sup> June, 2017 partly reads as follows:-

**“We act for the above matter and address you as herein under.**

**The Plaintiff's Advocates in the matter have served us with a hearing notice that the case will be heard on 11<sup>th</sup> July, 2017. We had on 12<sup>th</sup> April, 2016 at a meeting in our offices between your Mrs Kiragu and Ms. Jesica requested you to provide us with the documents listed below and you promised that Ms. Jesica would deliver the same to our offices on 15<sup>th</sup> April, 2016 at 11.00am but to date you have either failed or intentionally ignored to provide the same. We have made several calls to both Mrs Kiragu and Ms. Jesica but our calls have remained un answered.**

- 1. Record of payments made to the Plaintiff against each invoice as supported by your LPO and suppliers delivery note.**
- 2. Names of your witnesses**
- 3. Witness statements**

**It is extremely disappointing that you have taken this case so lightly despite the fact that the amount claimed from your institution is colossal.”**

Counsel for the appellant referred to the letter dated 25<sup>th</sup> July, 2018 which letter makes reference to the advocate's earlier letter of 29<sup>th</sup> June, 2017. The crucial part of that letter reads as follows:-

**“The matter came up for hearing on 11<sup>th</sup> June, 2018 and judgement was delivered today, the 25<sup>th</sup> July 2018 by the Honourable Makau. We advise that judgment was found against you stating amongst other things that as no defendant's witness appeared to testify the Plaintiff's suit remained unchallenged. Please refer to our letter dated 29<sup>th</sup> June, 2017 (photocopy attached) in which we requested you to avail witnesses amongst others but you failed to do so. It was held that the entire sum of Kshs 957,850 as well as costs and interest at court rates from the date of filing the suit, is payable to the plaintiff.”**

It is established that the letter from Ms Onyatta & Co. Advocates of 29<sup>th</sup> June 2017 was not advising the appellant about the hearing date of 11<sup>th</sup> July, 2018. The hearing of 11<sup>th</sup> June, 2017 did not take place. There is no confusion about the notification of the appellant about the hearing of the case. Mr. Onyatta appeared in court on 11<sup>th</sup> July 2018 and the presumption is that he must have notified his client about the hearing of the case. The reference to the letter of 29<sup>th</sup> June, 2017 by Mr. Onyatta was simply meant to inform the appellant that it failed to provide witnesses. Mr. Onyatta had called for witnesses way back in 2016 when he had a meeting with the appellant's officers on 15<sup>th</sup> April, 2016.

The record does confirm that Mr. Siro appeared twice for the appellant. He did not tell the court that he was from the A.G's office. Further, on 11<sup>th</sup> June, 2017, he requested to put his house in order but subsequently vanished from the proceedings. The only advocate on record was M/s Onyatta & Co. Advocates. If there were any blunders committed by the A.G's office by failing to take over the matter, that does not make the hearing unprocedural or not fair. The appellant was duly represented by the advocate it had lawfully appointed to defend the case. I do therefore find that the appellant was duly represented by a counsel during the hearing of the matter. The advocate who appeared during the hearing of the case had instructions to defend the case. The letter from the Ministry of Education dated 8<sup>th</sup> June, 2016 did not debrief M/s Onyatta & Co. Advocates. From 8<sup>th</sup> June, 2016 upto 11<sup>th</sup> July 2018 when the case was heard, the A.G. did not do anything to take over the matter. The trial court was not expected to know that Mr. Siro was from the A.G.'s office and not from the firm of Onyatta & Co. Advocates. I am satisfied that the appellant was not condemned unheard. The appellant was accorded all the opportunity to defend itself.

The appellant applied to have the judgment set aside vide its application dated 11<sup>th</sup> September, 2018. The appellant was notified about the entry of judgment on 25<sup>th</sup> July, 2018. It took over one month until 11<sup>th</sup> September, 2018 when the application to set aside the judgment was made. By then time to appeal against the judgment had lapsed.

The grounds on the face of the application are that the appellant was never served with a hearing notice, that the appellant had a good defence and will suffer irreparable damage if execution is done. The request to set aside the judgment and proceedings was done on the basis that the appellant had not been properly represented or that it was represented by the wrong advocate. This line of argument draws its support from the letter dated 8<sup>th</sup> June, 2016 from the Ministry of Education. There is no letter from the appellant asking the firm of Onyatta & Co. Advocates to stop acting for them. Similarly, the A.G's office never communicated with the said firm of advocates on the issue of representation of the appellant. Mr. Siro unprocedurally appeared in court without stating that he was from the A.G's office. The A.G. did not file a notice of change of advocates. From the time the defence was filed in December 2015 to the hearing in July, 2018, no witness statement was filed. Mr. Onyatta registered his frustrations that the appellant was not cooperating in the matter vide his letters of 29<sup>th</sup> June, 2017 and 25<sup>th</sup> July, 2018. Summons were served on 20<sup>th</sup> May, 2014 and for over eight months until 28<sup>th</sup> February, 2015 when default judgment was entered, the appellant opted to remain silent. Warrants were issued on 8<sup>th</sup> October, 2015 and it is the execution of those warrants which triggered the appoint of M/s Onyatta & Co. Advocates on 16<sup>th</sup> October, 2015.

I am satisfied that the trial court conducted a fair hearing. The appellant was duly represented by an advocate who had instructions to defend the claim. The A.G's office was instructed to take over the matter and defend the appellant but failed to do so. The A.G. cannot claim that it would have offered better defence compared to M/s Onyatta & Co Advocates. Even if that was to be the case, the trial court cannot be faulted since there was counsel on record. The appellant has itself to blame for failing to provide documents and witnesses to its advocate.

The respondent did prove that he was shortlisted as one of the supplier of goods to the appellant. He testified that he was partly paid for some of the goods he delivered and what he was claiming was the balance. General invoices and delivery notes were produced.

I am satisfied that the trial court properly dismissed the appellant's application dated 11<sup>th</sup> September, 2018 seeking to set aside the judgment. The appeal lacks merit and is hereby dismissed with costs to the respondent.

**DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2021**

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**S. CHITEMBWE**

**JUDGE**